UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MICHAEL J. HARRINGTON, Plaintiff, v. WILLIAM E. COLBY, Director of Central Intelligence, HENRY KISSINGER, National Security Advisor to the President of the United States, etc., and WILLIAM E. SIMON, Secretary of the Treasury, Defendants.	Civil Action No. 74-1884

POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

TABLE OF CASES

* Notes or authorities chiefly relied upon.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MICHAEL J. HARRINGTON, Plaintiff, v. WILLIAM E. COLBY, et al., Defendants.	)	Civil Action No. 74-1884

MOTION TO DISMISS

Defendants, William E. Colby, Director of Central Intelligence; Henry Kissinger, National Security Advisor to the President of the United States, Chairman of the Intelligence Committee of the National Security Council and Chairman of the 40 Committee; and William E. Simon, Secretary of the Treasury, by their undersigned attorneys, hereby move the Court pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss this action. The grounds for this Motion are that the action presents political questions inappropriate for judicial resolution, that plaintiff lacks the requisite standing to maintain the action, and that the issues raised by the Complaint fail to present any justiciable claim with regard to plaintiff.

In support of this Motion, the Court is respectfully referred to the Points and Authorities filed herewith.

Respectfully submitted,

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POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Statement

Plaintiff, predicating his standing on the basis of his capacities as a Congressperson, citizen, and taxpayer, has instituted this action for declaratory and injunctive relief regarding both the funding of the Central Intelligence Agency (hereinafter sometimes referred to as the CIA) and certain of its activities, which plaintiff claims are outside the agency's statutory authority. The Complaint raises two distinct issues:

(1) Whether the CIA has exceeded its statutory authority, as prescribed by 50 U.S.C. § 403(d),[1/] by allegedly engaging

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1/ 50 U.S.C. § 403(d) provides as follows:

> (d) For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council --

in specified non-intelligence gathering (Complaint ¶ 7-23) and domestic surveillance activities (Complaint ¶ 52-65); and

(2) Whether Congress' appropriation of monies for the operation of the CIA, pursuant to the National Security Act of 1947, 50 U.S.C. 403 et seq., which exempts the CIA from disclosure of its appropriations and expenditures, 50 U.S.C. §§ 403c(a), 403e(b), and 403j(b), is in violation of the constitutional requirement for a Statement of Accounts and Expenditures, Art. I, § 9, cl. 7:

> No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement of Accounts of the Receipts and Expenditures of all public money shall be published from time to time.

1/ Continued from page 1.

> (1) to advise the National Security Council in matters concerning such intelligence activities of the Government departments and agencies as relate to national security.
>
> (2) to make recommendations to the National Security Council for the coordination of such intelligence activities of the departments and agencies of the Government as relate to the national security;
>
> (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: Provided, That the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions: Provided further, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: And provided further, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;
>
> (4) to perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally;
>
> (5) to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.

Defendants have moved pursuant to Rule 12, Federal Rules of Civil Procedure, to dismiss this action. In our view plaintiff cannot maintain this action, for (1) he lacks the requisite standing, whether as a citizen, a taxpayer, or a Congressperson, and (2) the suit presents political questions wholly inappropriate for judcial resolution. These Points and Authorities are in support of defendants' Motion.

ARGUMENT

I. Plaintiff Lacks The Requisite Standing To Maintain The Action

A. Plaintiff Does Not Have Standing As A Citizen Or Taxpayer To Bring The Instant Suit

The Supreme Court recently considered the standing of a citizen to sue to enforce the Incompatibility Clause of the Constitution to foreclose members of Congress from holding Reserve Commissions. In that case, Schlesinger v. Reservists Committee, ____ U.S. ____, (hereinafter Reservists) 94 S. Ct. 2925 (1974), the Court held that the plaintiffs lacked standing to maintain the challenge. The Court reaffirmed its earlier holding in Ex Parte Levitt, 302 U.S. 633 (1937), that:

> [S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. [Schlesinger v. Reservists Committee, ____ U.S., at ____, 94 St. Ct. at 2932].

Plaintiff's claims in this case regarding the CIA's alleged violation of its charter and Congress' violation of the Statement of Accounts Clause of the Constitution are as much the mere assertion of generalized grievances as was the plaintiff's claim in Reservists.[2/] The interest plaintiff,

2/ Plaintiff does not allege that he himself has been the subject of surveillance or has otherwise suffered a direct and particular injury as a result of the action challenged as being unlawful. See Laird v. Tatum, 408 U.S. 1 (1972).

as a citizen, asserts to be adversely affected is ". . . only the generalized interest of all citizens in constitutional governance and that is an abstract injury," which is not sufficient to meet the constitutional requirements for standing to sue. Reservists, supra, 94 S. Ct. at 2930; see Flast v. Cohen, 392 U.S. 83, 106 (1968).

Nor does plaintiff's assertion of an interest as a taxpayer render his claim judicially cognizable. "The [Supreme] Court has previously declined to treat [such] 'generalized grievances' about the conduct of government as a basis for taxpayer standing." Reservists, supra, 94 S. Ct. at 2930. For example, the Supreme Court in United States v. Richardson, (hereinafter Richardson) ___ U.S. ___, 94 S. Ct. 2940 (1974), rejected an assertion of taxpayer standing as the basis for another challenge to the statutorily-prescribed funding scheme for the CIA. The plaintiff-taxpayer in Richardson, like the plaintiff here, challenged the CIA's funding as being violative of the Statement of Accounts and Expenditures Clause of the Constitution (Art. I, §9, cl. 7). The Court held that plaintiff did not have the requisite standing to raise such a claim because:

> This is surely the kind of a generalized grievance described in both Frothingham and Flast, since the impact on [the plaintiff] is undifferentiated and common to all members of the public. Richardson, supra, 94 S. Ct. at 2946.

Richardson disposes of plaintiff's identical claim of taxpayer standing in the instant case as a basis for challenging the constitutionality of the CIA's funding statutes. In addition, since the constitutionality of that funding scheme clearly bears no closer a nexus to plaintiff's "taxpayer" status than do his claims concerning the CIA's alleged

violations of its statutory charter, it is clear that plaintiff is no better situated to raise the latter claims in his capacity as a taxpayer.

B. Plaintiff Does Not Have Standing As A Congressman To Raise Issues Concerning The CIA's Violation Of Its Statutory Charter

Plaintiff also asserts that he has standing to bring the instant lawsuit because of his responsibilities as a member of Congress. He suggests that he has a judicially cognizable need for a declaration as to whether the CIA has violated its statutory charter by allegedly engaging in non-intelligence related and domestic surveillance activities in order that he be informed in the future discharge of his legislative duties, including whether he will:

> . . . vote for the impeachement of the defendants Colby, Kissinger and other civil officers of the United States;
>
> . . . vote for legislation . . . prescribing the agency's activities and ensuring that such prescriptions are obeyed;
>
> . . . vote for legislation . . . limiting the use by the agency of any public funds; and
>
> . . . take other legislative actions relative to the activities of the agency. [Complaint ¶ 17].

Clearly, all plaintiff seeks from the Court in this regard is an advisory opinion to inform him in his own political decisions. Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (C.A. 2), cert. denied, 94 S. Ct. 1935 (1974). While the doctrine of Congressional standing has been recognized in this Circuit,[3/] it has not been and cannot

3/ See Kennedy v. Sampson, ____ F.2d ____ (CADC 1974); Mitchell v. Laird, 488 F.2d 611 (CADC 1973). But see, Lamm v. Volpe, 449 F.2d 1202, 1204 (CA 10 1971), cert. denied, 405 U.S. 1075; Gravel v. Laird, 347 F. Supp. 7, 9 (D. D.C. 1972).

be extended so far as to abrogate the "'oldest and most consistent thread in the federal law of justiciability,'" Flast v. Cohen, 392 U.S. 83, 96 (1968), that the federal courts will not render advisory opinions.

The doctrine of Congressional standing must be accommodated to the general law of standing and justiciability. Plaintiff must at a minimum show that he has sustained or is immediately in danger of sustaining a direct concrete and particular injury as a result of the challenged action. Reservists, supra, 94 S. Ct. at 2932; Laird v. Tatum, 408 U.S. 1, 13 (1972). See O'Shea v. Littleton, 414 U.S. 488, 493-499 (1974); Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973). The law of standing has developed into a two-tier test, requiring plaintiff to show (1) "injury in fact" and (2) that his interest "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970); see Flast, supra.

A Congressperson's role and responsibility as a legislator may be held to accord him standing to raise certain issues in his official capacity, when he can show an injury to himself in his capacity as legislator and establish a nexus between his status as Congressperson and the constitutional provision asserted to have been infringed. As to those executive actions which might constitute an "injury in fact" to a Congressperson in the performance of his official duties, the Courts have recognized that legislators have a "plain direct and adequate interest in maintaining the

effectiveness of their votes." Coleman v. Miller, 307 U.S. 433, 438 (1939). Thus, a legislator seeking to protect the effectiveness of a vote cast or to be cast from an unconstitutional usurpation of a legislative function by the Executive may well be capable of showing a sufficiently immediate injury to a judicially cognizable interest to have standing.[4/]

Each of this Circuit's congressional standing cases is explainable and distinguishable on this rationale. In Kennedy v. Sampson, ____ F.2d ____ (CADC 1974), Senator Edward Kennedy challenged an attempted pocket veto during a Congressional recess of the Family Practice of Medicine Act. The Court in Kennedy held that the plaintiff-Senator had been injured in his official capacity because the President's action had "deprived him of his constitutional right to override the

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4/ However, it must also be noted that substantial doubt exists as to whether an individual legislator may maintain suit on behalf of the Congress without its formal authorization or participation. In Reed v. County Commissioners, 277 U.S. 376 (1928), the Supreme Court held that the membership of a Senate select committee was without standing to bring suit against county officers to obtain possession of certain ballot boxes. In concluding that the Senators were not authorized to sue on behalf of the Senate, much less Congress as a whole, the Court stated:

> Petitioners do not claim that any Act of Congress authorizes the committee or its members, collectively or separately, to sue. * * * [Indeed], the Senate did not intend to authorize the committee, or anticipate that there might be need, to invoke the power of the Judicial Department. [277 U.S. 388-389].

Compare Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D. D.C. 1973), with Senate Select Committee on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D. D.C. 1974). Accordingly, in the absence of any Congressional authorization whatsoever for this suit, plaintiffs may not have standing to vindicate the alleged interests of the Congress.

Presidential veto." Id., at ____. And, the constitutional provision at issue, Art. I, § 7, providing for the override of a Presidential veto, was intended to protect the rights of Congresspersons, such as the plaintiff, to vote for an override. Thus, in Kennedy, the plaintiff-Senator had met the two-tier standing test by showing both an injury to his performance of his official duties and that the constitutional provision allegedly breached was intended to give Congress rights vis-a-vis the Executive.

Similarly, in Mitchell v. Laird, 488 F.2d 611 (CADC 1973), the Court found in dictum that a Congressperson had standing to challenge the constitutionality of the President's action in conducting the Viet Nam War.[5/] The plaintiff-Congresspersons had alleged that the challenged executive action deprived them of their constitutional role in determining whether the United States should fight a war. The alleged usurpation of Congress' war-making power was considered a judicially cognizable impairment of the legislator-plaintiffs' constitutionally-defined role. Moreover, since Art. I, § 8, vests the power to declare war in Congress, it is intended to protect Congressional authority. Thus a concrete injury to the Congresspersons-plaintiffs in their official capacities was at least arguably presented in Mitchell.

The case before the Court here is entirely different. Plaintiff does not ask the Court to vindicate his constitutionally-defined right to vote on an issue committed exclusively

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5/ The Court, in Mitchell, appeared to rely, at least in part, on the Congressperson-plaintiffs' interest in a declaration of executive illegality as it bore on their congressional duty to vote on impeachment. In a similar case, the Court of Appeals for the Second Circuit correctly noted that such a rationale amounts to "asking the judiciary for an advisory opinion which is precisely and historically what the 'cases and controversy' conditions set forth in Article III, Section 2 of the Constitution forbid." Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (C.A. 2), cert. denied, 94 S. Ct. 1935 (1974).

to the Legislative Branch. Plaintiff merely seeks to have the Court provide him with a declaration as to the construction of the CIA's statutory charter -- an advisory opinion which he states is necessary to better inform him in fulfilling his obligations as a Congressperson. The plaintiff's asserted interest obviously runs afoul of the Supreme Court's concern in Reservists, supra, 94 S. Ct. at 2932, that requiring a showing of concrete injury "'insures the framing of relief no more broad than required by the precise facts to which the Court's ruling would be applied.'" The Court's warning in Laird v. Tatum, 408 U.S. 1, 14-15 (1973), is also particularly apropos here:

> Stripped to its essentials, what [plaintiff] appear[s] to be seeking is a broad-scale investigation, conducted by [himself] as [a] private part[y] armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the [CIA's] intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the [CIA's] mission.
>
> * * *
>
> [T]his approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the "power of the purse;" it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.

Accordingly, plaintiff's complaint that the CIA has exceeded its statutory authority does not fall within the ambit of a properly confined congressional standing doctrine and instead runs afoul of Article III's limitation on the jurisdiction of the federal courts.

C. Plaintiff Does Not Have Standing To Challenge The CIA's Funding Statute

Plaintiff also argues that he has standing as a Congressperson to challenge the statutory funding procedure for the CIA which allows that agency to receive and expend appropriated public funds without a full public statement.[6/] Plaintiff's argument ultimately falters on the Supreme Court's reasoning in Richardson, supra.

Plaintiff apparently asserts that he has a constitutionally protected interest in securing information on the CIA's funding, since such information is necessary to his conscientiously fulfilling his role as a legislator in voting on appropriations measures (Complaint ¶ 36). Hence, plaintiff alleges the denial of such information amounts to "injury in fact" to him in his capacity as a Congressperson.[7/] Moreover, plaintiff maintains that the Statement of Accounts Clause is intended to protect Congress' access to information about the Executive's conduct of government and expenditure of public funds; in short, the clause is a necessary concomitant of the 'power of the purse' entrusted to Congress.

Plaintiff's analysis fails, first, because he is not seeking to prevent the Executive from acting to deprive him of some essential element of his role as a legislator.

6/ See 10 U.S.C. 2308-09; 50 U.S.C. 403c(a), e(b), j(b).

7/ It may well be that plaintiff's claim for access to information on the CIA's funding is now moot. The plaintiff-Congressperson has recently been appointed to a Congressional committee investigating CIA activities, in which capacity he is likely to share whatever access to this information the committee may obtain.

The gravamen of his complaint is rather that Congress itself, for whose benefit the Statement of Accounts Clause exists, has improperly construed that provision in enacting the CIA's funding legislation. What the complaint fails to make clear is that under the statutorily authorized procedure, CIA expenditures are disclosed to two committees (Armed Services and Appropriations) of the House of Representatives. Moreover, plaintiff, as a member of the House of Representatives, is entitled, under the Rules of the House, to have access to documents of those committees concerning total CIA expenditures. See Rules of the House of Representatives, 93d Cong., Rule XI, 27(c). Thus, plaintiff's standing as a Congressperson is premised on the anomalous contention that Congress has somehow injured him in his official capacity by its choice of means in exercising its own constitutional authority. Recognition of standing to assert such a claim would be a substantial and untoward extension of the Congressional standing doctrine.

Whatever may be the ultimate disposition of the doctrine of Congressional standing, which has not yet been squarely faced by the Supreme Court, plaintiff's quest to establish a right to information allegedly necessary to his legislative responsibility is well beyond the topical reach of that doctrine. Although the Courts have recognized a judicially cognizable interest in a legislator's vote, however, they have never found a legislator's interest merely in obtaining information related to the performance of his duties to warrant similar judicial protection.[8/] The Supreme Court's

8/ In EPA v. Mink, 410 U.S. 73 (1973), Congressperson Patsy Mink and 32 other members of Congress sued in their official capacities and under the Freedom of Information Act (FOIA) to secure information on certain atomic tests. The District Court dismissed the suit insofar as it was brought by the plaintiffs in their official capacities, the Court of Appeals remanded without reaching that issue, and the Supreme Court declined to comment on the issue in rejecting plaintiffs' FOIA claim.

decision in Richardson, supra, indicates that such an interest is simply too abstract to satisfy the standing requirement of Article III. The Court there rejected a citizen voter's assertion of standing to raise a similar challenge to the secrecy of the CIA's appropriations where the claim was that information on the CIA's expendit res was necessary for the plaintiff to ". . . fulfill his obligations as a meber of the electorate in voting for candidates seeking national office." Id., 94 S. Ct. at 2946. Although the franchise as a fundamental constitutional right warrants judicial protection, see, e.g., Reservists, supra, 94 S. Ct. at 2933, n. 13 the Court in Richardson refused to recognize access to information needed for the informed exercise of the ballot as an interest warranting judicial protection. Similarly, a Congressperson does not necessarily have a judicially cognizable interest in access to information relevant to his legislative duties just because there is a judicially protectable interest in his right to cast an effective vote. Accordingly, plaintiff lacks standing, as a Congressperson, to enforce his asserted right to access to information about the CIA's funding.[9/]

9/ Plaintiff also makes a puzzling claim for information pursuant to the Freedom of Information Act and 5 U.S.C. § 7102, yet plaintiff admits that the CIA is exempted from both of the statutes by 50 U.S.C. § 403g and 403c respectively. (Complaint ¶ 48-49). Rights under the Freedom of Information Act (and 7102) are purely statutory hence can be lawfully abridged by statute, so plaintiff has not stated any claim for which relief can be granted under these disclosure provisions.

II. The Issues Presented By Plaintiff's Complaint Are Non-Justiciable

A. Plaintiff's Challenge To The CIA's Conduct Of Covert Foreign Operations Presents A Non-Justiciable 'Political Question'.

The allegations of plaintiff's complaint concerning the CIA's covert foreign operations raise questions concerning the most serious and delicate aspects of our national security and the conduct of foreign affairs -- matters clearly unsuited to judicial scrutiny. The issue of whether the CIA has engaged in illegal covert foreign operations is, by its nature, a 'political question' hence not justiciable before a federal court.

The classic formulation of the political question doctrine is that a case which satisfies any of the following formulations is beyond the reach of judicial resolution:

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker v. Carr, 369 U.S. 186, 217 (1962).

The question of the lawfulness of the CIA's foreign covert operations, as presented by plaintiff, is, fundamentally,

a question of the propriety of important and delicate choices concerning the conduct of our nation's foreign relations. A federal court should not become ensnarled in conflicts between the political departments of governments concerning such issues because:

> "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (emphasis added). See also United States v. Pink, 350 U.S. 203, 222-223 (1942); United States v. Belmont, 301 U.S. 324, 328 (1937); Oejten v. Central Leather Co., 246 U.S. 297, 302 (1918).

Accordingly, judicial inquiry into the lawfulness of the alleged covert foreign activities is barred by the political question doctrine.[10/] The issue is committed to the political departments of government, and legislative and executive inquiries concerning CIA operations are even

10/ Although the allegations of the complaint concerning domestic surveillance may not be 'political questions' in the same sense, they are equally unsuited to present judicial resolution. In Laird v. Tatum, 408 U.S. 1 (1972), the Supreme Court found a claim that the Army's domestic surveillance and data gathering system were unlawful to be non-justiciable for lack of any demonstrated real and direct injury or immediate threat of injury to the plaintiffs. See Davis v. Ichord, 442 F.2d 1207 (CADC 1970). Since plaintiff Harrington has not even alleged that he was among those surveilled, his alleged injury is even more speculative. See O'Shea v. Littleton, 414 U.S. 488 (1974).

now underway. The essentially political decisions involved in determining the proper scope of intelligence operations are delicate and complex, and are ". . . of a kind for which the judiciary has neither aptitude, facilities nor responsibilities. . . ." Such decisions involve policy determinations of a kind clearly for non-judicial discretion. Moreover, the serious embarrassment to our nation in the conduct of its foreign relations that could result from judicial intrusion into the conduct of our government's foreign intelligence gathering and other covert foreign operations is self-evident. See Totten v. United States, 92 U.S. 105 (1875).

One Court has already dismissed a strikingly similar suit brought, inter alia, by plaintiff Harrington on the grounds that it presented a 'political question.' Harrington v. Schlesinger, 373 F. Supp. 1138 (E.D. N. C., 1974) (appeal pending). As in this action, plaintiffs sought declaratory and injunctive relief against officials of the Executive Branch (including defendants CIA Director and Secretary of the Treasury) for the alleged violation of statutory limitations on activities relating to the Viet Nam War, and violation of the same constitutional provision (Art. I, §9, cl. 7) which is at issue here. The District Court granted defendants' Motion to Dismiss, holding that the issues before the Court were 'political questions' beyond the scope of judicial inquiry:

> Congress passed these laws and it, rather than the courts, is far better equipped to determine its intent in passing them. Congress, with the broad powers of its committees, has better facilities to investigate any excesses of the

> Executive under the laws. If the laws are being too broadly construed by the Executive, the Congress could enact new legislation to impose additional restrictions on the expenditure of funds in Southeast Asia. Since this action involves questions of foreign policy . . . [T]here is an unusual need for unquestioning adherence to a political decision already made." Baker v. Carr, supra, 369 U.S. at 317, 82 S. Ct. at 710.
>
> This court concludes that the questions presented by this action are clearly political, and beyond the scope of judicial inquiry or decision. . . . [373 F. Supp. at 1141-1142].

B. The Issue Of Whether The CIA Statutory Funding Scheme Violates The Statement Of Accounts Clause Is A Non-Justiciable 'Political Question'.

Even if plaintiff has standing to challenge the statute which allows the CIA's operations to be funded without a full public accounting, that issue is non-justiciable because it is a political question. Although both are elements of the Article III "case or controversy" requirement, the standing and 'political question' doctrines pose "distinct and separate limitation[s]" on federal court jurisdiction. Reservists, supra, 94 S.Ct. at 2929.

> "[E]ither the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party."

The political question doctrine stems from concerns for separation of powers and precludes a federal court from intruding upon the authority granted expressly to another branch of government. Powell v. McCormack, 395 U.S. 485, 518 (1969). Since the touchstone for determining when a case presents a non-justiciable political question is, therefore, whether the issue is committed to one of the political departments of government -- the Legislative or Executive, Id.; accord, Baker v. Carr, 369 U.S. 186, 217 (1962), it is appropriate to examine the constitutional provision at issue to determine to which branch its implementation is committed. That the nature of the statements of accounts and expenditures required by Art. I, §9, Cl. 7, is a matter committed entirely to the Legislative Branch is demonstrated by the Supreme Court's discussion of that clause in Richardson, supra.

> "[As to W]hat is meant by 'a regular Statement of Account,' it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest. . . . [H]istorical analysis of the genesis of cl. 7 suggests that it was intended to permit some degree of secrecy of governmental operations. The ultimate weapon of enforcement available to the Congress would, of course, be the 'power of the purse.' . . .
>
> "Not controlling, but surely important, are nearly two centuries of acceptance of a reading of cl. 7 as vesting in Congress plenary power to spell out the details of precisely when and with what specificity agencies must report the expenditure of appropriated funds and to exempt certain activities from comprehensive public reporting." [Richardson, supra, 94 S. Ct. at 2947, n. 11].

The origins of Clause 7 justify the Supreme Court's tentative conclusion that it was never intended to limit Congress' plenary authority to decide that certain narrow classes of federal expenditures (such as the CIA's budget) should not be disclosed where delicate questions of foreign policy or military security are involved. Congress' plenary power was intended to include the authority to withhold from the public knowledge of expenditures. "The reason urged in favor of [Clause 7's] ambiguous expression, was that there might be some matters which might require secrecy.[11/] In matters relative to military operations and foreign negotiations, secrecy was necessary sometimes."[12/] 3 Farrand, The Records of the Federal Convention of 1787, p. 326 (1911).

11/ Patrick Henry, an opponent of the provision as adopted, complained bitterly that, ". . . the national wealth is to be disposed of under the veil of secrecy; . . . they may conceal what they may think requires secrecy." 3 Elliot's Debates on the Federal Constitution, 462 (1836).

12/ Shortly after the Constitution was adopted, President Madison, the architect of Clause 7, sent a confidential communication to Congress outlining a plan to take possession of parts of Spanish Florida. In response, Congress passed a secret appropriations act, which was not made public until 1818. Miller, Secret Statutes of the United States, GPO (1918); 3 Stat. 471-72.

Congress has here exercised its pleanary power to exact from the Executive Branch what it considers an adequate accounting in view of the national security and foreign affairs implications of the CIA's expenditures. A member of the Congress should not now be heard to ask a federal court to review the Congress' wisdom in the exercise of that plenary power. If plaintiff believes a fuller statement is required his remedy is within the Chamber in which he serves not a federal court.[13/] Courts should not be called upon as a forum for a replaying of the political game.[14/]

CONCLUSION

For the reasons set forth above, defendants respectfully request the Court to dismiss this action.

Respectfully submitted,

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13/ As noted in footnote 7 above, plaintiff has recently become a member of a Special Committee of the House of Representatives studying CIA activities. 121 Cong. Rec. H 882 (Feb. 19, 1975 daily ed.). The searching congressional inquiries, in which plaintiff is an active participant, into the CIA's activity only serves to underscore the degree to which the issues raised in his complaint are matters committed to the surveillance of Congress and ultimately the political process, rather than the Courts.

14/ A. Bickel, Politics and the Warren Court, 134 (1965).

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MICHAEL J. HARRINGTON,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	
	)	No. 74-1884
WILLIAM E. COLBY, et al.,	)	
	)	
Defendants.	)	

ORDER

Upon consideration of the Motion to Dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure by defendants Colby, Kissinger, and Simon, and the Court being fully advised in the premises, it is therefore, this _____ day of _____, 1975 hereby

ORDERED:

That this action be and hereby is dismissed.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion to Dismiss, Points and Authorities in support thereof, and proposed Order upon plaintiff's counsel by mailing a copy, postage prepaid this 25th day of February, 1975 to:

Michael Krinsky, Esquire
Rabinowitz, Boudin and Standard
30 East 42nd Street
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DAVID J. ANDERSON

FROM Central Intelligence Agency
Washington, D. C. 20505

NO. Q440946

DATE 5 Jun 75

TYPE OF MATERIAL
X ENVELOPE (S)
PACKAGE (S)
OTHER

TO: Mr. Paul Ahern
%Rep. Robert [redacted]
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LOG DATA

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